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Nos. 00-1751, 00-1777 and 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated.

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INTEREST OF THE UNITED STATES

The court of appeals in this case held that the Ohio Pilot Project Scholarship Program violates the Establishment Clause of the First Amendment. That program provides tuition aid and other assistance to the parents of students enrolled in failing public schools in Cleveland, Ohio, and permits the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated.

The court of appeals' decision squarely conflicts with a decision of the Ohio Supreme Court upholding the same pilot program under the Establishment Clause, as well as with a decision of the Wisconsin Supreme Court upholding a similar program. It is in the Nation's interest that that clear conflict be resolved by this Court, so that policymakers may know, without further delay, whether such programs are a constitutionally permissible option for expanding educational opportunity for children enrolled in failing public schools across America, or whether other solutions must be sought for this critical national problem.

Congress has enacted several general assistance programs that make funds available to individuals to enable them to obtain services from private entities, including entities with religious affiliations. For example, under the Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858a *et seq.*, States may establish programs that provide low-income families with "child care certificates," in the form of a "check or other disbursement," that may be used to purchase services from a private entity, including a provider of "sectarian child care services if freely chosen by the parent." 42 U.S.C. 9858n(2) (1994 & Supp. IV 1998).

Likewise, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 604a(a)(2)(B)(ii) (Supp. IV 1998), permits States to use federal funds in programs that furnish "certificates, vouchers, or other forms of disbursement" to low-income families to enable them to obtain certain social services. "[R]eligious organizations are eligible, on the same basis as any other private organization, as contractors to provide [such] assistance, or to accept certificates, vouchers, or other forms of disbursement." 42 U.S.C. 604a(c) and (e)(1) (Supp. IV 1998).[1]

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[1] As part of those and analogous programs, Congress has also adopted "charitable choice" provisions intended to eliminate disincentives for religiously affiliated groups to provide services under such programs. See, *e.g.*, Pub. L. No. 106-310, Div. B, § 3305, 114 Stat. 1212; 42 U.S.C. 604a(a), 9920 (Supp. IV 1998).

In addition, Congress has recently enacted legislation that permits parents to use education individual retirement accounts (or IRAs) to pay elementary and secondary school expenses for their children. Under that program, covered expenses include those "incurred in connection with the enrollment or attendance of the designated beneficiary of the trust as an elementary or secondary school student at a public, private, or religious school." Pub. L. No. 107-16, § 401(c)(2), 115 Stat. 58. The program permits individuals to withdraw gains on funds held in an education IRA for covered purposes without having to pay federal income tax.

The United States has participated as a party or as an amicus curiae in numerous cases arising under the Establishment Clause, including most recently in *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Lee* v. *Weisman*, 505 U.S. 577 (1992); and *Board of Education* v. *Mergens*, 496 U.S. 226 (1990). See also, *e.g.*, *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983).

STATEMENT

1. More than 75,000 children, most of whom are from low-income families, are enrolled in the Cleveland City School District.[2] In 1995, a federal district court placed that district under the control of the State Superintendent of Public Instruction because of a financial crisis that, in turn, gravely affected the educational performance of schools in the

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[2] In 1996, 72.5% of the students in the Cleveland district were from "economically * * * disadvantaged" families. *Cleveland City School District Performance Audit* 1-4 (Mar. 1996) (*1996 Audit*).

district. The Cleveland district met none of the 18 state standards used to evaluate minimum acceptable performance, and students in the district performed far worse than students in other Ohio public schools. A 1996 report, for example, found that only 9% of the district's high school students passed all four sections of Ohio's ninth grade proficiency test. *1996 Audit* 2-3.

a. In June 1995, in the midst of that educational crisis, the Ohio legislature enacted a "Pilot Project Scholarship Program." Ohio Rev. Code Ann. (ORC) §§ 3313.974-3313.979 (Anderson 1999 & Supp. 2000). The program provides two basic kinds of benefits: (1) scholarships for students who reside in a covered school district to attend a participating public or private school of their families' choosing, and (2) tutorial assistance grants for "an equal number of students * * * attending public school in any such district." ORC § 3313.975(A). The program is limited to "school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." *Ibid.* The Cleveland district currently is the only school district in Ohio that falls in that category. Pet. App. 4a.[3]

All private schools located within the boundaries of a covered school district are eligible to participate in the program, without regard to whether they are religiously affiliated. ORC § 3313.976(A)(1). To participate in the program, private schools must meet state educational standards, ORC § 3313.976(A)(3), and agree not to discriminate on the basis of race, religion, or ethnic background, and not to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion, ORC § 3313.976(A)(4) and (6). Public schools located in school districts adjacent to the pilot school district

[3] The "Pet. App." references are to the appendix accompanying the petition in No. 00-1751.

are also eligible to participate in the program. ORC § 3313.976(C).

b. The program provides tuition aid for children in kindergarten through eighth grade. ORC § 3313.975(B) and (C)(1). Funds are distributed in the form of checks. For students who use the scholarship to attend a private school, checks are made payable to the students' parents, but parents are required to endorse the checks over to the school. ORC § 3313.979. For those who use the scholarship to attend an adjacent public school, checks are made payable to the school district itself. *Ibid.* In awarding scholarships, preference is given to "students from low-income families," *i.e.*, families whose income is below 200% of the poverty line. ORC § 3313.978(A). Scholarships may be awarded "to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Pet. App. 4a (quoting manual).

Low-income families also receive preferential treatment when it comes to the amount of the scholarships. For low-income families, the program pays 90% of the lesser of the private school's tuition, or an amount up to $2500 determined by the state superintendent each year. ORC § 3313.978(A) and (C)(1). In addition, a private school may participate in the program only if it agrees not to require a low-income family to pay more than the remaining 10% of the applicable tuition. ORC § 3313.976(A)(8). For other families, the program pays 75% of the tuition scholarship up to $1875 (75% of $2500), and there is no cap on the tuition that a private school may charge. ORC §§ 3313.976(A)(8), 3313.978(A).

Once a student is selected to participate in the program and the amount of the tuition scholarship has been set, the student's parents are responsible for selecting and applying for admission to a participating school. ORC § 3313.978(A). Schools are required to admit program students in accor-

dance with criteria established by the state superintendent and the nondiscrimination principle set forth above. ORC § 3313.976. In the 1999-2000 school year, 56 private schools participated in the program, 46 of which were considered religiously affiliated. None of the public schools in districts adjacent to the Cleveland district elected to participate. In that same year, 3700 students participated in the scholarship program, most of whom (96%) enrolled in a religiously affiliated school. Pet. App. 5a.[4] No student who has applied for admission to a nonreligious private school participating in the program has been denied admission. *Id.* at 48a, 51a.

c. The program also provides for tutorial assistance grants for students whose parents choose to keep them in a public school in the covered school district. ORC § 3313.978(B). Students from low-income families receive 90% of the amount charged for assistance (up to $360), while students from other families receive 75% of that amount. ORC § 3313.978(B) and (C)(3). Tutorial assistance grants are made "payable to the parents of the student," and then endorsed over by the parents to the service provider. ORC § 3313.979. The state superintendent must offer as many tutorial assistance grants for families who choose to keep their children in a covered public school as tuition scholarships for families who choose to send their children to a participating private school. ORC § 3313.975(A).[5]

2. In 1996, respondents in No. 00-1751 brought suit in state court, challenging the Ohio program on federal and state grounds. The Ohio Supreme Court held that the program does not violate the Establishment Clause. *Simmons-*

[4] That percentage has fluctuated. At one point, "as many as 22% of the students enrolled in the program attended nonreligious schools." Pet. App. 5a.

[5] In addition to the foregoing pilot program, students within the Cleveland school district are eligible to participate in magnet and community school programs. See Pet. App. 117a n.15.

Harris v. *Goff*, 711 N.E.2d 203, 211 (1999). In so holding, the court rejected the argument that *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), compels a different result, observing that *Nyquist* "has been undermined by subsequent case law that culminated in the [Supreme Court] stating, '[W]e have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid.'" *Id.* at 208 (quoting *Agostini* v. *Felton*, 521 U.S. 203, 225 (1997)).[6] The court also emphasized that "[w]hatever link between government and religion is created by the School Voucher Program is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." *Id.* at 209 (quoting *Witters* v. *Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487 (1984)).

The Ohio high court nonetheless concluded that the program violated a provision of the Ohio constitution (§ 15(D), art. II) requiring that no bill shall have more than one subject, because the program was enacted as part of an appropriations bill that also addressed other subjects. 711 N.E.2d at 214-215. The Ohio legislature subsequently reenacted the pilot program in 1999 in a manner that remedied the "one-subject" problem, but did not alter the substance of the provisions discussed above. Pet. App. 7a.

3. a. In July 1999, respondents filed this action in federal district court, seeking to enjoin the program as reenacted on the ground that it violates the Establishment Clause. Two groups of students and schools participating in the program (petitioners in No. 00-1777) intervened to defend the program, and a second suit was filed in the same court challeng-

[6] As discussed pp. 13-14, *infra*, in *Nyquist* this Court held unconstitutional a New York program providing tuition reimbursement and certain other assistance to the parents of children who attended New York private schools, the majority of which were sectarian.

ing the program. The district court consolidated the actions and granted a preliminary injunction against the program. Pet. App. 7a-8a, 128a-132a. After the court of appeals declined to stay that preliminary injunction, this Court granted a stay pending appeal. 528 U.S. 983 (1999); Pet. App. 127a. In December 1999, the district court granted summary judgment for respondents and entered a permanent injunction against the program (*id.* at 61a-126a), finding it "factually indistinguishable from the tuition reimbursement program struck down in [*Nyquist*]." *Id.* at 123a.

b. A divided panel of the Sixth Circuit affirmed. Pet. App. 1a-58a. The majority held that *Nyquist* "governs" this case, reasoning that under the program in *Nyquist* and the one here "parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefitted by these tuition dollars are sectarian." *Id.* at 24a-25a. Although the majority acknowledged that the Ohio program is "facial[ly] neutral[]," it concluded that the program "has the impermissible effect of promoting sectarian schools." *Id.* at 25a-27a. The majority explained that, in its view, "the tuition restrictions mandated by the statute limit the ability of [private] nonsectarian schools to participate in the program," because of the "lower tuition needs" of many religious schools. *Id.* at 25a-26a. The majority also found it significant that no adjacent public school outside the Cleveland district has participated in the program, *id.* at 2[illegible], and concluded that the Ohio program provides parents with only an "illusory choice" to enroll their children an alternative, nonreligious school. *Id.* at 32a.

The majority rejected the argument that this Court's decisions in *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini*, *supra*; *Mueller* v. *Allen*, 463 U.S. 388 (1983); and *Witters*, *supra*—in which the Court upheld under the Establishment Clause neutral government assistance programs that

indirectly benefitted religiously affiliated organizations—required a different result, reasoning that the "effect" of the Ohio program in this case "is in direct contravention" to those cases. Pet. App. 29a.

c. Judge Ryan dissented from the majority's Establishment Clause ruling. Pet. App. 34a-58a. He concluded that "[t]he New York statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects." *Id.* at 34a; see *id.* at 36a-40a. In addition, although he accepted the correctness of *Nyquist* (*id.* at 40a), Judge Ryan believed that the majority overlooked the teachings "of the Supreme Court's several Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided." *Id.* at 35a. In particular, he reasoned that this Court's more recent decisions, including *Mitchell*, *Agostini*, *Mueller*, *Witters*, and *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), established that "whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice." *Id.* at 41a; see *id.* at 40a-43a.

Judge Ryan concluded that the Ohio program affords the parents of students in the Cleveland school district such "a *genuine* choice." Pet. App. 45a; see *id.* at 45a-46a. He rejected the majority's belief—based largely on the percentage of religious compared with nonreligious private schools participating in the program—that the program "creates a forbidden 'incentive' for parents in Cleveland to choose a religious school." *Id.* at 48a. "[T]he indisputable fact," Judge Ryan explained, is "that of *all* the private nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason." *Ibid.*; see *id.* at 51a ("It is [also] indisputable that no nonreligious, private school, or any other school for that matter, has ever been discouraged from participating in the Cleveland voucher program."). Moreover, Judge Ryan noted, "the

Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion." *Id.* at 48a.

DISCUSSION

The petitions for certiorari in this case should be granted. State and federal courts are divided over the constitutionality of educational assistance programs such as the Ohio pilot program invalidated by the court of appeals in this case. The Sixth Circuit's decision squarely conflicts with the decision of the Ohio Supreme Court holding that the same program at issue in this case does not violate the Establishment Clause, as well as with the decision of the Wisconsin Supreme Court in *Jackson* v. *Benson*, 578 N.W.2d 602, cert. denied, 525 U.S. 997 (1998), upholding a similar program.

Numerous States have enacted educational assistance programs similar to the one invalidated in this case, or are considering the enactment of such programs. The court of appeals' ruling in this case—and the decisional conflict that it directly implicates—cast doubt on the validity of those programs, and perhaps as well on other programs that provide aid to individuals on neutral terms and permit the use of that aid to obtain services from private organizations, regardless of the religious or nonreligious character of those organizations. As we have explained above (p. 2), Congress has enacted several assistance programs that share those basic features, while differing in certain other respects.

This Court's guidance is needed as both Congress and the States seek to enable disadvantaged persons to enlist the services of private organizations—without regard to whether such organizations have any religious affiliation—to meet important individual needs and address critical social issues facing the Nation. In particular, as lawmakers and educators search for solutions for economically disadvantaged children enrolled in underperforming or, as in

this case, failing public schools, the Court's guidance is needed concerning whether the type of program challenged in this case is a permissible option for expanding educational opportunity for those children, or whether other solutions must be sought. Most critically, delay in resolving that issue of vital national importance would disserve the interests of the students themselves.

The Court's recent Establishment Clause decisions underscore that the "principles of neutrality and private choice" are key in evaluating whether government assistance programs that may indirectly benefit religion have an impermissible effect of advancing religion. *Mitchell*, 530 U.S. at 810 (plurality opinion); see *id.* at 838-842 (O'Connor, J., joined by Breyer, J., concurring in the judgment). In our view, the court of appeals erred in concluding that the validity of the Ohio program in this case is controlled by *Nyquist*, because of the important differences between the program challenged in *Nyquist* and the program at issue in this case. But, in any event, we believe that the result reached by the court of appeals is out of step with the teachings of this Court's subsequent Establishment Clause decisions. We urge the Court to grant certiorari and clarify the proper application of its precedents in this critical area.

1. The importance of this case is underscored by the conflict of authority over the constitutionality of government programs that provide certificates or disbursements to the parents of children enrolled in underpreforming public schools and permit the parents to use that assistance to enroll their children in a participating private school of their own choosing, religious or not.

That conflict is starkly presented by the divergent rulings of the Ohio Supreme Court and the Sixth Circuit on the constitutionality of the Ohio program at issue in this case. As discussed above, the Ohio Supreme Court held that the material components of that program do *not* violate the

Establishment Clause. In so holding, the Ohio court rejected the argument that this Court's decision in *Nyquist* dictates a contrary conclusion, reasoning that "[t]he *Nyquist* holding has been undermined by subsequent case law." *Simmons-Harris*, 711 N.E.2d at 208. By contrast, the Sixth Circuit—though acknowledging the Ohio Supreme Court's prior ruling, Pet. App. 7a—concluded that the same program *does* violate the Establishment Clause, reasoning that *Nyquist* compels that result. *Id.* at 24a. That clear conflict between the federal court of appeals and the Supreme Court of Ohio over the constitutionality of an important state program in itself weighs heavily in favor of certiorari.

The Sixth Circuit's decision in this case also squarely conflicts with the decision of the Wisconsin Supreme Court in *Jackson*, *supra*. That case involved a challenge to a state tuition aid program (the Milwaukee Parental Choice Program) analogous to the Ohio program at issue here. Like the Ohio program, the Milwaukee program sustained in *Jackson* seeks to offer educational opportunities to low-income families with children enrolled in underperforming public schools. Similarly, the Milwaukee program provides aid to the parents of school children and allows the parents to use that aid to enroll their children in a private school of their own choosing, regardless of whether that school is religiously affiliated. The Wisconsin Supreme Court held that the Milwaukee program does not violate the Establishment Clause, expressly rejecting the argument that the case was "controlled" by *Nyquist*. 578 N.W.2d at 614 n.9.

In so holding, the Wisconsin Supreme Court emphasized that "[a]ny aid provided under the [Milwaukee program] that ultimately flows to sectarian private schools * * * does so 'only as a result of genuinely independent and private choices of aid recipients.'" 578 N.W.2d at 618 (quoting *Witters*, 474 U.S. at 487). In addition, the Wisconsin court rejected the argument that the fact that most (89 out of 122)

of the private schools that participated in the program were sectarian established that the program had an impermissible effect of advancing religion, finding that "[t]he percent of program funds eventually paid to sectarian private schools is irrelevant to our inquiry." *Id.* at 619 n.17. By contrast, in striking down the Ohio program, the Sixth Circuit specifically relied on the fact that a higher percentage of students participating in the program have enrolled in religiously affiliated schools than other schools. Pet. App. 26a.[7]

2. a. That conflict stems in large part from disagreement over the application of this Court's decision in *Nyquist*. That case involved a challenge to a New York program that provided direct grants to private schools for maintenance and repair costs, and that established tuition reimbursement and state income tax deductions for parents who chose to send their children to private schools in New York, the "great majority" of which schools were sectarian. 413 U.S. at 783. Legislative findings established that the program was intended to provide financial support to the State's private schools, and thereby prevent a "massive increase in public school enrollment and costs." *Id.* at 765. This Court held that the program had the impermissible "effect" of ad-

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[7] Other courts have also considered the constitutionality of state tuition aid programs and reached divergent results. Compare, *e.g.*, *Campbell* v. *Manchester Bd. of Sch. Dirs.*, 641 A.2d 352 (Vt. 1994) (state tuition aid program that permits parents to use public funds to enroll their children in an adjacent public school or (sectarian or nonsectarian) private school does not violate the Establishment Clause), with *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127, 143 (Me.) (concluding that, in the absence of a provision excluding sectarian private schools from state tuition aid program, the "tuition program would violate the Establishment Clause") (citing *Nyquist*), cert. denied, 528 U.S. 947 (1999); and *Strout* v. *Albanese*, 178 F.3d 57, 61 (1st Cir.) (same), cert. denied, 528 U.S. 931 (1999). See also *Kotterman* v. *Killian*, 972 P.2d 606 (Ariz.) (state tax credit for contributions to scholarship funds that provide tuition for private and religious schools does not violate the Establishment Clause), cert. denied, 528 U.S. 810, 921 (1999).

vancing religion. *Id.* at 780. In so holding, the Court rejected the argument that the tuition-reimbursement and tax-deduction provisions were valid because they simply provided benefits to the parents of children, who in turn chose the school in which to enroll their children. In the Court's view, those provisions "fare[d] no better under the 'effect' test" than the direct-grant provision. *Id.* at 785.

The Ohio program challenged in this case differs in important respects from the program invalidated in *Nyquist*. For example, the purpose of the program in *Nyquist* was to support private schools in New York (most of which were sectarian) and, indeed, a key component of the program included *direct* grants to those schools. 413 U.S. at 780-782 & n.38. By contrast, the purpose of the Ohio program is to create educational opportunities for students enrolled in failing public schools. The program was passed in response to the educational crisis in Cleveland, and is limited to children enrolled in school districts subject to federal court orders. Moreover, the Ohio program in this case, unlike the New York program in *Nyquist*, also provides assistance to parents who choose to keep their children in public schools. As discussed above, the Ohio program guarantees funding for an equal number of grants to parents who prefer to keep their children in public schools and receive tutoring. In addition, the Ohio program provides for tuition aid for students who elect to attend an adjacent public school (although thus far no such school has participated).

Moreover, in *Nyquist*, this Court expressly reserved judgment on the constitutionality of a program "involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 783 n.38 (citation omitted). That question was not necessary to the Court's decision because the only beneficiaries of the New York program were the parents of children who attended private schools and the private schools themselves. By contrast, as we have discussed, the Ohio program in this case provides assistance *both* to parents who elect to enroll their children in a private school *and* to parents who elect to keep their children in public school.

b. Especially in light of this Court's subsequent decisions, we do not believe that *Nyquist* should be understood to render unconstitutional programs like the one that Ohio has adopted for students in failing public schools in Cleveland. As this Court recognized in *Agostoni*, the Court's Establishment Clause jurisprudence has undergone "significant[]" changes in the past few decades, particularly in "the criteria used to assess whether aid to religion has an impermissible effect," the key issue in *Nyquist*. 521 U.S. at 223, 237. Since *Nyquist* was decided, this Court has repeatedly upheld government assistance programs that are "neutral[]" insofar as aid "is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality). Furthermore, "[a]s a way of assuring neutrality, [the Court has] repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (quoting *Agostini*, 521 U.S. at 226); see *id.* at 841-843 (O'Connor, J., joined by Breyer, J., concurring in the judgment).

Accordingly, this Court has repeatedly upheld educational assistance programs that offer aid to a broad class of individuals and that benefit religion only indirectly as a result of the private choices of the program's beneficiaries. For example, in *Zobrest*, the Court held that federal funds could be used to pay for the services of a sign-language interpreter who assisted a deaf child enrolled in a sectarian school, where the funds were made available to a broad class of individuals on neutral terms, without regard to whether the school was public or private, sectarian or nonsectarian.

As the Court explained, "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." 509 U.S. at 10.

Similarly, in *Witters*, the Court upheld a blind person's use of vocational assistance made available under a state program to enroll in a sectarian school. As the Court explained, "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. And, in *Mueller*, the Court upheld a state law permitting parents to deduct certain educational expenses from their state income tax, without regard to whether the parents chose to send their children to a public or private—or sectarian or nonsectarian—school. The Court reasoned that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally." 463 U.S. at 399 (citation omitted).[8]

Since *Nyquist* was decided, this Court has also made clear that a general assistance program does not establish religion in violation of the Constitution simply because more beneficiaries of the program choose to obtain services from a religious rather than nonreligious institution. For example,

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[8] Private choice also helps to ensure that the government is not seen as endorsing religion. As Justice O'Connor has explained, when government aid flows to religious institutions only as a result of the private choices of beneficiaries, it is unlikely that a "reasonable observer" would infer "that the State itself is endorsing a religious practice or belief." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 848 (1995) (concurring); accord *Mitchell*, 530 U.S. at 843 (concurring in judgment); *Witters*, 474 U.S. at 493 (concurring in part and concurring in the judgment); cf. *Capital Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 774 (1995) (concurring in part and concurring in the judgment).

in *Mueller*, the Court rejected the argument that a state law establishing an income tax deduction for educational expenses had an impermissible effect of advancing religion because the "the bulk"—more than 90%—"of deductions taken [under the program] will be claimed by parents of children in sectarian schools." 463 U.S. at 401. The Court observed that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Ibid.*

Similarly, in *Agostini*, the Court upheld the use of federal funds to send public school teachers into private schools to provide remedial education to disadvantaged children, despite the fact that more than 90% of the private schools within the jurisdiction of the school board at issue were sectarian. 521 U.S. at 210. In so ruling, the Court emphasized that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229. See also *Mitchell*, 530 U.S. at 812 n.6 (plurality opinion) (*Agostini* "held that the proportion of aid benefitting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the [Establishment Clause] inquiry."); *ibid.* (discussing *Witters*); cf. *Good News Club* v. *Milford Cent. Sch.*, No. 99-2036, 2001 WL 636202, at *11 n.9 (June 11, 2001) ("When a limited public forum is available for use by groups presenting any viewpoint, * * * we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.").

c. As demonstrated by the decisional conflict discussed above, as well as the opinions of the majority and dissenting judges of the Sixth Circuit panel in this case, guidance is needed from this Court on the application of *Nyquist* to

educational assistance programs, such as the Ohio program in this case, that do not include direct grants to private schools; that offer financial assistance to the parents of students who attend public as well as private schools; and that are enacted in response to specific educational crises in failing public schools. As discussed above, we do not believe that the result in *Nyquist* governs the constitutionality of such a program. But to the extent that *Nyquist* might be applied—as it was by the Sixth Circuit in this case—to strike down the different type of program here, we believe that that decision is at odds with the teachings of this Court's subsequent Establishment Clause decisions.

As the Court recently emphasized in *Agostoni*, only this Court can resolve whether its "more recent cases have, by implication, overruled an earlier precedent." 521 U.S. at 237. To the extent that *Nyquist* is read to cast doubt on the program at issue in this case, we urge the Court to consider whether the assumptions underlying the "effect" analysis in *Nyquist* have been eroded by the Court's subsequent Establishment Clause decisions.

3. In our view, the Ohio program comports with the central tenets of this Court's Establishment Clause jurisprudence. The program distributes educational aid on neutral terms, offering both tuition and tutorial assistance to all students enrolled in a covered school district, without regard to religion. All private schools within a covered district are eligible to participate in the program, without regard to whether they are sectarian or not, as are all public schools in districts adjacent to the covered district. And religious schools may benefit under the program only as a result of the independent and private choice of parents to enroll their children in a participating religious school, rather than send their children to a participating nonreligious school, keep them in public school and obtain tutorial assistance, or avail themselves of one of the other options provided by Ohio

(including magnet or community schools). In these central respects, the Ohio program shares the same key features as the general assistance programs sustained by this Court in *Zobrest*, *Witters*, and *Mueller*.

In reaching a contrary conclusion, the Sixth Circuit pointed to the percentage of students enrolled in the program who elected to use tuition aid to attend a sectarian school. As discussed above, however, this Court has refused to invalidate facially neutral assistance programs based on a statistical analysis of how religious versus nonreligious institutions ultimately fared under those programs. See *Agostini*, 521 U.S. at 210; *Mueller*, 463 U.S. at 401. Moreover, as Judge Ryan pointed out, "there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason," nor is there any evidence "that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." Pet. App. 51a-52a. Nothing in the record, in other words, establishes that the percentage of students enrolled in private religious schools is the product of anything other than the truly private choice of eligible parents to enroll their children in those schools.[9]

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General educational assistance programs similar to the Ohio pilot program at issue in this case are in existence or under consideration in numerous school districts across the

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[9] The Sixth Circuit also relied on the fact that no adjacent public school has participated in the program. Pet. App. 26a. As Judge Ryan explained, however, "there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate." *Id.* at 50a. Moreover, the Ohio program provides that resources must be set aside for an equal number of students who prefer to remain in a public school and receive tutoring.

country, as communities seek to create new opportunities for children enrolled in failing public schools. The Court should grant certiorari and resolve the conflict and confusion among the federal and state courts over whether such programs are a constitutionally permissible means of addressing one of our Nation's most basic charges, the education of its youth.[10]

CONCLUSION

The petitions for a writ of certiorari should be granted on the Establishment Clause question.

Respectfully submitted.

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[10] Petitioners in No. 00-1779 have presented a separate question concerning whether the Sixth Circuit improperly failed to accord preclusive effect to the Ohio Supreme Court's Establishment Clause ruling in *Simmons-Harris*. See Pet. App. 30a-31a. Although we do not take a position on the merits of that issue, we believe that the grant of certiorari should be limited to the question whether the type of educational assistance program challenged in this case violates the Establishment Clause. That is the issue that has divided the state and federal courts, and on which guidance is particularly needed from this Court.